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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 955

DAVID GOLDWASSER,

Petitioner,

v.

ROBERT C. SEAMANS, JR., Secretary of the Air Force; ROBERT E. HAMPTON, Chairman, Civil Service Commission; JAMES E. JOHNSON, Member, Civil Service Commission; L. J. ANDOLSEK, Member, Civil Service Commission; UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA; ATTORNEY GENERAL OF THE UNITED STATES and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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I.

The United States, in its opposing brief completely misstates petitioner's argument as to the nature of the government's obligation to produce the foreign military officer students as witnesses and also misreads this Court's decision in *Williams v. Zuckert, cert. dismissed,* 371 U.S. 531 (1963), *on rehearing,* 372 U.S. 765 (1963).

First, the government erroneously *and* repeatedly contends that petitioner seeks to require the government *to*

compel these witnesses to testify. (Res.Opp. 2,7,9,10)[1] At no time has petitioner taken such a position. Instead, he maintains that, where the witnesses were clearly under the influence of their military hosts, the government was obligated to "make at least a good faith effort to produce witnesses sufficiently under its control to affect their ability to be present at the hearing." (Pet. 8) In advance of the *de novo* hearing held before the Civil Service Commission's Regional Examiner, the government was well-aware that the liaison officers who were responsible for dealing with foreign officer-students were not in favor of them testifying and "had been instructed not to get involved in United States matters." (J.A. 95)[2] Neither the Air Force not the Civil Service Commission took a single step to dispel these impressions. Petitioner seeks only to establish that the government should have made it crystal clear that not only would the giving of testimony by these officers be consistent with their position as guests in the United States, but that that the Air Force would, in fact, welcome their participation to insure that petitioner received a fair hearing. Under the circumstances, the government had an obligation to take some active steps to encourage the witnesses to testify including inviting them to testify as requested by the petitioner.

Second, the government argues that the question of the government's obligation never arises because the petitioner did not attempt to contact the visiting officers directly,

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[1]The Brief for the Respondent in Opposition will be denoted as "Res.Opp."

[2]The government's reference to the Report of the Civil Service Commission investigation, indicated that the liaison officers were not in favor of their students testifying but would contact them. It omitted an essential sentence from that report, as follows:

> "They [the liaison officers] indicated they had been instructed not to get involved in United States' matters." (J.A. 95)

and, therefore, failed to discharge his initial responsibility to obtain their attendance placed upon him by this Court in *Williams v. Zuckert, supra.* This is a misreading of that case which requires only that the person seeking the testimony discharge his initial burden by:

> "making a timely and sufficient attempt to obtain their presence *or under the circumstances and without fault of his own,* [be] *justified in failing to make such an attempt.*" 372 U.S. at 765 (emphasis added)

After that, the obligation shifts to the government.

The record in this case indicates quite clearly that petitioner was justified in his belief that a direct effort on his part to secure the witnesses' attendance would have been futile. The facts outlined earlier, especially the reluctance of the liaison officers to have their fellow officers get involved and that they had been specifically instructed not to get involved, amply support this belief. Petitioner recognized this futility, and sought, instead, to obtain the presence of the witnesses by seeking the aid of the Air Force and the Civil Service Commission. The situation which made a direct effort appear futile existed without fault of petitioner and justified his failure to make that direct attempt. At the same time, petitioner did not just sit back and hope that the witnesses would appear. By repeatedly requesting the aid of the government, he took those steps which he thought would have the best chance of actually securing the witnesses' attendance.

II.

The government replies to petitioner's argument on the First Amendment by stating only that the petitioner was aware of the policy proscribing "controversial" statements and that the government had correctly balanced petitioner's interest in expressing his personal views against the interests of the Air Force. Respondent relies heavily on the fact that petitioner had been warned previously about discussing

"controversial" subjects to establish that the petitioner was aware of the policy and knew how he was expected to behave.[3] The prior warnings, however, in no way cured the vagueness of the prohibition. Even if petitioner had been clearly aware of such a policy, the warnings he received would not have given him any greater idea of the scope of activities which were to be considered as falling within their policy. There was no way to know whether a particular

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[3]The government, in the face of Air Force Regulation 40-712, sets out *in haec verba*, four alleged prior warnings in footnote 2, page 4. This regulation provides:

> "The Air Force shall not *consider* in any disciplinary action, or any action of dismissal, any charges made more than three years preceding the intended dismissal." (Emphasis added)

Two of these incidents occured more than three years prior to the initiation of the removal action against petitioner. Here, the government, by relying on the theory that the prior warnings gave notice of a policy against discussing "controversial" subjects, as it has at every level in this case, manages to refer repeatedly to them in its brief in opposition. (Res.Opp. 5)

If the Air Force regulation is to have any force and effect, it should bar out-of-time incidents from being brought up at any stage of the proceedings for any purpose, lest the employee be penalized because of "bad character" and not for specific acts for which discharge is authorized. Regulations are meant to be followed. *Vitarelli v. Seaton*, 359 U.S. 35 (1959); *Service v. Dulles*, 354 U.S. 369 (1957).

However, these prior incidents do highlight a number of aspects of this case:

(1) There was a continuing pattern of hostility toward the petitioner by his superior;

(2) No regulation or policy is referred to prohibiting singing in class, yet that is a partial basis for two of the admonishments. (Would singing in class really be grounds for dismissal as "conduct prejudicial to the interests of the United States?")

(3) The vagueness of the policy against discussing controversial matters is *nowhere* defined and includes "always discussing (unstated) controversial matters" and even answering questions about the magazine "Watchtower."

subject, a certain view point about a particular subject, or only particular views expressed in certain contexts would be considered controversial.[4] In addition to these defects in the government's dismissal of petitioner's First Amendment argument, nowhere does the government deny petitioner's assertion that the question is sufficiently important for the Supreme Court to decide. It argues only that its view of the way in which the balancing process was resolved is the right one.

Petitioner disagrees. There is grave doubt, for example, whether the petitioner would have been dismissed for discussing the Vietnam war in a way *favorable* to the official United States government position. Whether the government can continue to restrict First Amendment freedoms in this fashion is an important question which the Supreme Court should decide.

Respectfully submitted,

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[4] Respondent's argument that petitioner's dismissal for these acts promoted "the efficiency of the service" is greatly undermined by the fact that the Air Force, shortly after the fourth of these earlier warnings had been administered, awarded petitioner a Master Instructor's Certificate, in recognition of his "outstanding achievement of professional standards while instructing the Air Training Command." (J.A. 131)